

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2070

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2070

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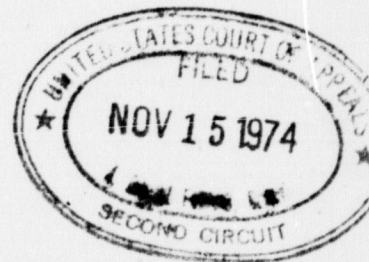
UNITED STATES OF AMERICA,

Appellee,

-against-

BOBBY TARVER,

Defendant-Appellant



On Appeal from the United States
District Court for the Eastern District
of New York

BRIEF AND APPENDIX ON BEHALF
OF APPELLANT TARVER

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

-against-

BOBBY TARVER,

Defendant-Appellant

INDICTMENT NO.

74CR-177

STATEMENT OF CASE

Appellant, BOBBY TARVER, was named in a four count indictment, together with co-defendant, HARVEY BONNER.

Under Indictment 74-CR-177, both defendants were charged with two counts of Possession and intent to distribute heroin on October 25, 1973 and November 7, 1973. The other two counts charge both defendants with actual distribution of the heroin on the above dates.

On the trial of the indictment, the appellant was represented by Joel Winograd. The trial was before the Honorable Jack B. Weinstein and a Jury and lasted two days. The Jury returned a verdict of guilty on all counts against both defendants. Appellant, BOBBY TARVER, was sentenced to the care and custody of the Attorney General for a term of five (5) years, plus a period of special parole.

The appellant was allowed to remain free on bail, pending appeal.

POINT ONE

IT WAS ERROR FOR THE COURT
TO ALLOW TESTIMONY REGARDING
THE APPELLANTS INVOLVEMENT IN
OTHER CRIMES.

Detective Feurtado, the undercover police officer in this case testified on direct examination that the co-defendant, HARVEY BONNER, had told him that the appellant had forgotten the package because he had been snorting cocaine (61; A-1). An objection was immediately made by appellant's attorney. After a sidebar discussion, Judge Weinstein ruled that the statement was made in the course of the conspiracy and was in furtherance and was used to explain why the delivery wasn't made. (62; A-2).

Neither the appellant nor his co-defendant were charged in the instant Indictment with the crime of conspiracy.

During the course of the same sidebar discussion, Judge Weinstein ruled that in the exercise of his discretion the probative force of this statement is greater than the prejudicial value (65; A-5).

The effect of allowing this statement to remain before the jury was to show criminal propensity on the part of the appellant.

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The Trial Judge is required, as with any potentially prejudicial evidence, to balance all of the relevant factors to determine whether the prohibitive value of the evidence of other crimes is outweighed by its prejudicial character. Spencer v. State of Texas, 385, U.D. 561, 87 S. Ct. 652; Kilarjian v. Horvath, 379 F. 2d 547 (2 Cir. 1967).

What was presented to the jury was certainly prejudicial and was not relevant or material to the jury's deliberation.

The net effect was that the jury was allowed to infer that since appellant has snorted cocaine, he certainly possessed it and if he possessed the cocaine, he most likely sold it.

The jury was permitted to infer the above from the highly prejudicial statement made by co-defendant, HARVEY BONNER to Detective Feurtado.

CONCLUSION

THE JUDGMENT BELOW
SHOULD BE REVERSED AND A NEW
TRIAL ORDERED.

Respectfully Submitted,
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Attorneys for Defendant-Appellant

JOEL WINOGRAD, ESQ.

A P P E N D I X

A-2

Feurtado-Direct

61

Q "He has the package?"

A Yes.

Q Did you go with Mr. Tarver at that time?

A At that time I followed Mr. Tarver into the bar area. I was accompanied by the confidential informant. Once we were inside the bar area, Mr. Tarver stopped, turned, and walked back out to the garage area, where he had a conversation with Mr. Bonner, at which time I turned around with the informant and we stayed -- went back outside to the gas station area.

Q Did there come a time when Mr. Tarver returned to the gas station?

A Yes.

Q Would you tell us the circumstances surrounding his return?

A Mr. Bonner had approached me and told me that Mr. Tarver had been snorting cocaine --

MR. WINOGRAD: Objection, your Honor, and I move for a mistrial.

Your Honor, may we approach the bench with the prosecutor?

THE COURT: Yes.

(A discussion was held at sidebar.)

MR. WINOGRAD: Your Honor, after we had our

1 hearing before, Mr. Bashian and Mr. Corcoran presented
2 to me another problem that they had, insofar as there
3 was another statement made by Mr. Bonner with
4 respect to Mr. Tarver in that the statement made to
5 the undercover -- that Mr. Tarver had forgotten
6 the package because he had been snorting cocaine earlier.

7 Now he said that -- I said it was a problem
8 that you couldn't use it. He said he would take it
9 up with you before using it. I told him to speak to
10 the officer.

11 THE COURT: Well, why can't he use it?

12 MR. WINOGRAD: I think it's a problem that
13 implicates my client and shows criminal activity
14 on his part.

15 THE COURT: But this is all in the course
16 of the conspiracy, it explains the actions of the
17 parties and is in furtherance of the conspiracy to
18 explain why the delivery wasn't made forthwith.

19 MR. WINOGRAD: But, Judge, this didn't only
20 come from my client. It came from Mr. Bonner.
21 Bonner allegedly.

22 THE COURT: Bonner is not an undercover agent.

23 MR. WINOGRAD: I understand.

24 THE COURT: He's a co-conspirator. I find beyond
25

1
2 a reasonable doubt there was a co-conspirator, this
3 was in the course of the conspiracy and in furtherance
4 of it. It's not like a post-arrest statement such
5 as we were dealing with in the suppression hearing.

6 MR. WINOGRAD: All right.

7 THE COURT: It's a simple evidentiary point.

8 MR. WINOGRAD: All right. My objection is
9 noted, your Honor.

10 THE COURT: The objection is on what ground,
11 hearsay?

12 MR. WINOGRAD: Well, it can't be hearsay
13 because you have declared them to be co-conspirators.

14 THE COURT: What's the objection?

15 MR. WINOGRAD: The objection is, I think it
16 is together with the other situation, the statements
17 that were made with respect to the co-defendant.

18 In other words, Bonner-- with respect to the
19 statement made before which you excluded. At that
20 time I said to you, well, will you exclude this,
21 you said you are going to bring it up with the Judge.

22 THE COURT: I don't understand the objection.
23 I'm sorry.

24 MR. WINOGRAD: The objection is as follows:
25 It's a statement that was made by Bonner to the under-
cover agent indicating the actions of the defendant

Feurtado-Direct

1
2 Tarver, why he forgot the package. It was my position
3 that this was a statement made that should be excluded.

4 THE COURT: On what ground?

5 MR. WINOGRAD: On the grounds -- the same
6 grounds that he excluded the other, that there is a
7 Bruton problem here, what if he doesn't take the
8 stand, what if I don't cross --

9 THE COURT: This is an entirely different
10 problem. That's a post-conspiracy statement.

11 MR. WINOGRAD: I understand that this was
12 during the conspiracy, but I still object.

13 THE COURT: On the hearsay grounds?

14 MR. WINOGRAD: On hearsay.

15 THE COURT: Overruled on that ground.

16 MR. CUTLER: One other thought, Judge, --

17 MR. CORCORAN: Are you objecting, Mr. Cutler?

18 MR. CUTLER: Well, I object -- as long as
19 they are declared co-conspirators, I would object
20 on the grounds that it's introducing an accusation
21 of another crime into the trial, the crime of
22 cocaine-snorting, it's possession.

23 THE COURT: There is no such crime.

24 MR. CUTLER: Well, possession of cocaine
25 is a crime.

THE COURT: If you wish an instruction to the

jury I will give it to them. Do you wish an instruction...

MR. CUTLER: Really, I can't -- no, I don't want to bring it to their attention.

THE COURT: Well, they -- then I can't give it if you don't want it. It clearly explains what was happening there.

Proceed. Come back, gentlemen.

(Return to sidebar.)

THE COURT: Though the objection was not made, I assume that had counsel thought of it, they would have made it on the ground that the prejudice was greater than the probative force. I rule as a matter of the exercise of my discretion that the probative force of this is greater than the prejudicial value and it is necessary for the jury to understand what was going on among these parties.

Otherwise it would be entirely confusing to them, and they would lose the entire force of the testimony.

MR. CUTLER: Judge, can I get in one thought, your Honor, on this objection: Is that -- we are only at the very inception of the policeman's testimony; it's only about his 7th or 8th statement that he has testified to, and this introduces --